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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1957

No. 845

WEYERHAEUSER STEAMSHIP COMPANY, a corporation,
Petitioner,

vs.

HAROLD YANOW,
Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

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vs.	
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PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit.

Weyerhaeuser Steamship Company, a corporation, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, filed and entered in the above-entitled case and controversy on November 21, 1957; and a new "judgment" [if it *is* a judgment] filed and entered on February 21, 1958.*

*Unless otherwise indicated, all emphasis is added.

1(a) REFERENCE TO THE OPINIONS DELIVERED IN THE COURT BELOW.

The original opinion of a "three-judge" panel or division of the United States Court of Appeals [R. pp. 199-202] printed in Appendix A, pp. 1-6, infra, is reported in 250 F. 2d 74. The "order" of the same panel setting it aside and the opinion of November 21, 1957, as amended February 21, 1958 [R. pp. 244-251], printed in Appendix A, pp. 9-11; 13-19, infra, are not reported at this date.

1(b) STATEMENT IN RESPECT OF THIS COURT'S JURISDICTION.

The original judgment of the Court of Appeals was filed and entered on November 21, 1957. [R. 203; Appendix A, p. 7, infra.] Weyerhaeuser Steamship Company's petition for rehearing, filed within the time allowed therefor, was denied by the "three-judge" panel on January 17, 1958. [R. p. 204; Appendix A, p. 8, infra.] The original judgment was set aside by an "Order" made and entered by the same three-judge panel or division, of its own motion, on February 21, 1958, more than a month after *they* denied the petition for rehearing [Supplemental R. pp. 244-246; Appendix A, pp. 9-11, infra.] The new or last "*judgment*" of the "three-judge" panel was filed and entered on February 21, 1958 [Supplemental R. p. 252] and is printed in Appendix A, p. 12, infra. *Retired* Circuit Judge William Denman was one of the "three-judge" panel. Therefore, only two *active* Circuit Judges participated in what was done on February 21, 1958. Although requested to do so, the *Clerk* of the United

States *Court of Appeals* for the Ninth Circuit, consisting of *nine* active Circuit Judges, has *refused* to prepare and certify a record showing that the nine active judges, or a majority of them, authorized the three-judge panel to do *anything* in respect of this case or controversy before or after January 17, 1958 when they denied the petition for rehearing. The *clerk*, in his certification, in effect, states that this subject is none of *this* Court's business! [R. p. 205; Supplemental R. p. 257.] The original *opinion* was *"amended"* by one filed and entered February 21, 1958. [R. pp. 247-251; Appendix A, pp. 13-19, infra.]

An order staying the issuance of the mandate is on file in the Court below. [R., p. 256.]

Because of more than a reasonable doubt in respect of the question whether a quorum of the United States *Court of Appeals* for the Ninth Circuit authorized the "three-judge" panel to set aside the judgment filed and entered on November 21, 1957; and the possibility that the Court below *may* make and enter a *valid* Order setting aside the February 21, 1958 Order, Opinion *and* Judgment of the "three-judge" panel; and thus reinstate the original judgment of November 21, 1957, petitioner—out of an abundance of caution—serves and files this petition now. No petition for rehearing, in respect of the "judgment" of February 21, 1958, has been or will be filed. Petitioner would lose its right to file this petition if it took the hazardous chance of filing another petition for rehearing and the nine active judges refused to consider it on the ground that the February 21, 1958 activities of the "three-judge" panel were completely unauthorized by a quorum of the said judges.

The appellate jurisdiction of the United States Supreme Court is invoked pursuant to the provisions of Article III, sections 1 and 2, U.S. Constitution; and Title 28, U.S.C., §1254(1).

1(c) QUESTIONS PRESENTED FOR REVIEW.

1. If due consideration is given to the fundamental *mandates* of the Constitution that "This Constitution and the Laws of the United States which *shall* be made in *Pursuance* thereof [obviously by the *Congress*]; . . . shall be the *supreme* Law of the Land" and that "*all* . . . judicial Officers, both of the United States and of the several States, *shall* be *bound* thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding", and that "*all* . . . judicial officers, both of the United States and of the several States, *shall* be *bound* by Oath or Affirmation, to *support* this Constitution", will any intellectually honest lawyer acting as a duly qualified state or federal judicial officer, *consciously and deliberately* abandon the performance of *judicial* functions and usurp or attempt to exercise any part of the powers of the *legislative* department of government?

2. Is it *obvious* that a *careful* examination and consideration of the complete opinion of a *unanimous* Supreme Court, and the *cases* and *statutes* specifically cited, in "*The Osceola*", even including the *obiter dicta*, will *demonstrate* that the Court did *not* declare or intend to declare that the *common* [or general] admiralty and maritime law imposed liability, *irrespective of negligence*, upon a ship *or* her owner for consequential damages suffered

by a member of the crew as a proximate result of "the unseaworthiness of the ship or a failure to supply and keep in order the proper appliances appurtenant to the ship"?

3. Is it true that whether a ship is or is not "seaworthy" is a question of *fact* which must be proved by a preponderance of evidence in the *trial* court; and that no court of appellate jurisdiction is vested with jurisdiction to do anything in respect of the finding of fact made by the trier of fact except to determine whether the *evidence* is legally sufficient to support such finding of fact?

4. Is it true, without the slightest doubt:

(a) that original and absolute sovereign *legislative* power is paramount to *delegated* legislative or judicial power, because the former can at any time control the extent or exercise of the latter?

(b) that, in a Constitutional "*Republican* Form of *Government*", unlike a *pure* Democracy, there are *three* separate and distinct Departments—Legislative, Executive and Judicial; and that one of the fundamental reasons for this separation is to protect the substantial rights of the minority from the possible effects of a "day-to-day" clamor of an emotional mob constituting a temporary majority?;

(c) that whatever parts of the 100% sovereign *legislative* Power of the enfranchised citizens of the States which were *actually* delegated to the *de jure* entity designated in the language of the Constitution as the "United States of America" are those *specifi-*

cally delineated *and delimited* by the plain and completely unambiguous language of Article I, Section 8; *and* that these powers have, at all times since their delegation and up to date, been vested *exclusively* in the Senate and House of Representatives†;*

(d) that in the area of the exercise of its *actually* delegated legislative power, in respect of the *relationships* of employer and employee, invitor and invitee, owner and licensee and owner and trespasser, the Congress is *restricted* to its Constitutional power "to regulate *Commerce* with foreign Nations, and among the several States and with the Indian Tribes"; and "To make all Laws which shall be *necessary and proper* [but *not* otherwise] for carrying into Execution the foregoing [Power]"†;

(e) that the *sole and exclusive* judicial power to decide *disputed* issues of fact, with the exception of the Cases specifically mentioned in Section 2 of Article III as to which the United States Supreme Court is vested with *original* jurisdiction, has *always*

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*The importance of *this* Constitutional law question is demonstrated in *United States v. Sharpnack*, 355 U.S. ___, 2 L. ed. 2d 282, 78 S.Ct. ___, decided January 13, 1958, in which the Court stated, in footnote 10, as follows:

"In Knickerbocker Ice Co. v. Stewart, 253 U.S. 149, 64 L. ed. 834, 11 A.L.R. 1145, 20 NCCA 635, supra, this Court voided a statute which attempted to make state workmen's compensation laws applicable to injuries within the federal admiralty and maritime jurisdiction. The *basis* of that holding, which we do not *now* re-examine, was that 'the Constitution not only contemplated but actually established' a 'harmony and uniformity' of law throughout the admiralty jurisdiction. Id. 253 U.S. at 164. That statute was voided because it was designed to 'destroy "what was *considered* to be a constitutionally required uniformity".' Ibid."

been and *now* is vested in the trial courts, State and Federal; *and* that this Court has never, in the *lawful* exercise of its Constitutionally vested *judicial* power as a court of *appellate* jurisdiction, possessed the lawful power to consider, as *evidence*, anything excepting that which was actually in the written, printed or typewritten Transcript of Record and the Exhibits offered and received in evidence *in* the trial court; *and* the *limited* matters of which it was lawfully entitled to take judicial notice†;

(f) that no judicial officers, including those of the United States Supreme Court, regardless of unanimity or division, have, or ever had, the slightest lawful power to *create* the *Public Policy* of the United States of America or of any of the States; or to *create* any *right of action* in *any* field of jurisprudence; or to extend, amend, delete from, add to or in *anywise* change any *right of action* created by the *unwritten* or written exercise, by the enfranchised citizens of the original 13 States or of the 35 which have subsequently joined the Union, of *their* sovereign legislative power†;

(g) that the common-law of England, the British Colonies in America and of the original thirteen States and the *common* [more often called "general"] admiralty and maritime *law* were *created*, not by *any* court, but pursuant to the actual exercise of the supreme legislative power of the enfranchised citizens by *their* acceptance and approval of *general and uniform* customs and usages which *thereby* became *non*-statutory rules of conduct, not dependent,

in the slightest degree, upon the "*acceptance*" thereof by *any* court; and that the *lawful* decisions of the Courts in these fields merely declared the existence of such *non*-statutory rules of conduct, and thus constitute mere *evidence* of the existence of such rules of conduct and nothing more†;

(h) that it is *only* "*In Suits at common law,* where the value in controversy shall exceed twenty dollars" that "the right of trial by jury shall be preserved"; and that no right of action pursuant to the *common* admiralty and maritime law is or can be included within the category of "Suits at common law" as that phrase was used, in its context in Amendment VII; and that, therefore, there is no *federal* constitutional right to trial by jury of the disputed issues of fact in respect of *any* claim based upon any "*common*-admiralty and maritime" right of action; and that the "trial by jury" remedy in all other [*statutory*], admiralty and maritime *rights of action* is provided in the federal and state trial courts solely because of the existence of a statute, if any, creating the right to demand such remedy†;

(i) that the word "Jurisdiction", in the sentence "The *judicial* Power (of the United States) shall *extend* . . . to *all* Cases of admiralty and maritime *Jurisdiction*" [Article III, Section 2, U.S. Const.] was used *both* in respect of the *undelegated, intra*-state, sovereign *legislative* power of the enfranchised citizens of the original 13 States in that branch of jurisprudence, *and* that *part* thereof which would be within the *delegated* legislative power of Congress

"to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes"; and that, in its context and place in the Article dealing exclusively with the *Judicial* power of the United States, it can have no other meaning or significance? [Footnote 10, United States v. Sharpnack, supra];

(j) that, in the area of the actually delegated judicial powers of sovereignty, this Court was and is without the slightest lawful power to *create* rights of action such as the Federal Employers Liability Act, the Jones Act, or to provide, by judicial *fiat*, that "In any case of admiralty and maritime jurisdiction relating to any matter of contract or tort arising upon or concerning any vessel of twenty tons or upward, enrolled and licensed for the coasting trade, and employed in the business of commerce and navigation *between* places in *different* states upon the lakes and navigable waters connecting said lakes, the trial of all issues of fact shall be by jury if either party demands it" [June 25, 1948, c. 646, 62 Stat. 953, 28 U.S.C. 1873]; or to create the rights and liabilities provided for in the "Longshoremen's and Harbor Workers' Compensation Act"; and that, *a fortiori*, it had no lawful power to create the workmen's compensation *"law"* it purported to create in *Mahnich v. Southern S. S. Co.*, 321 U.S. 96, 88 L. ed. 561; or to *extend* said "law" to longshoremen and other harbor workers in *Seas Shipping Company v. Sieracki*, 328 U.S. 85, 90 L. ed. 1099; *Pope & Talbot v. Hawn*, 346 U.S. 406, 98 L. ed. 143, and similar deci-

sions written since and based upon the same *personal* legislative, social and "public policy" ideologies and philosophies of the Judges who then constituted the numerical majority of the United States Supreme Court?

5. Whether the decision and judgment of the three-Judge Panel or Division of the United States Court of Appeals for the Ninth Circuit, and the custom and practice of that Court in respect of the vitally important question whether a petition for rehearing should or should not be considered and determined by the nine *active* Circuit Judges of that statutory Court, are and each thereof is or is not *repugnant* to the rights, privileges and immunities of petitioner as guaranteed to it, and *all other litigants* in *every* case or controversy within the appellate jurisdiction of that Court, by the provisions of Article III, Sections 1 and 2; the due process of law clause of Amendment V, all of Amendment VII, all of Amendment X; other pertinent parts of the federal Constitution; and the provisions of section 1652, Title 28, U.S. Code?

6. Whether the "Rule" [U.S. Ct. of Appeals, 9 Cir., Rule 23], promulgated by the Judges of the Ninth Circuit, that all petitions for rehearing *must* be addressed to and *determined* by the Judges who constituted a three-judge panel or division, and *prohibiting* a plea to *the* United States *Court of Appeals* for the Ninth Circuit, is repugnant to and in conflict with the language "The Judicial Power *shall* be *vested* in one Supreme Court and in such inferior *courts* as the *Congress* may from time to time ordain and establish", in Article III, Section 1,

Constitution of the United States; and the provisions of Section 2 in respect of the Cases and Controversies to which said Judicial Power "*shall* extend" [Embrace or cover]?

7. What, on the *date* of the ratification of the U.S. Constitution, was the commonly understood definition of the verb "extend" as used in Section 2, Article III, wherein it is provided that "The *Judicial* Power" [of the United States], *vested* by Section 1 "in one supreme Court and in such inferior Courts as the Congress may from time to time ordain and establish", "shall *extend*" to *all* of the first *three* classes of Cases; but *not to all* of the subsequently described Cases or Controversies"?

8. What is set forth in any part of the Constitution, or any "Law made in Pursuance Thereof" [which is "the *supreme* Law of the Land"] which supports or justifies the statement in the opinion of the three-judge "division or panel" in the case at bar, as follows: "There is no question that there was evidence warranting a verdict for Yanow for it is now a long established *law* that a shipowner is liable to a stevedore loading its vessel if it be unseaworthy as to its decks by the *presence* thereon of sufficient oil or grease to make it slippery to one walking over it, and the stevedore is injured thereby. The liability exists although the shipowner has no knowledge of the presence of the oil or grease." [*Yanow v. Weyerhaeuser Steamship Company*, 250 Fed. 2d 74, 75; Supplemental R. 248.]

9. Pursuant to what authority did the "division or panel" have the power, as a court of statutory *appellate* jurisdiction, to deprive the petitioner of its valuable prop-

erty right in that *part* of the *dual* judgment of the United States District Court which was based upon a legally supported *dual* verdict and the implied *findings of fact* made by the jury in favor of petitioner in respect of the *actionable negligence* claim [Amendment VII, U.S. Constitution]?

10. In view of the provisions of Amendment X where is there any lawful basis for ignoring the *substantive* law of the State of Oregon, or that of any *other maritime State*, in respect of the *grounds* upon which an invitor is liable to an invitee in the event such invitee *avers and proves* that he was lawfully entitled to be at the *place* of injury and was *not* a licensee or trespasser? Is it legally possible for a longshoreman on board a vessel afloat upon the navigable waters of the *aquatic* domain of any State of the Union to be classified, at the *precise* time and place of injury, in any status other than as an invitee, licensee or trespasser?

11. Where a plaintiff longshoreman scrambles two separate and distinct claims into one pleading and trial omelet; does not request the trial court to submit special interrogatories or a separate form of verdict as to each; is he equitably or lawfully entitled to ambush the trial court and his adversary by failing the request the trial Judge to instruct the jury in two distinct and separate declarations of the law, each applicable exclusively to one of the two claims; and then further ambush the trial judge and his adversary by a clear failure to comply with the requirements of Rule 51, Rules of Civil Procedure, when the judge gives, without any specific segre-

gation of instructions applicable to one claim from those applicable to the other, by the act of his attorney in merely stating, *erroneously*, that an instruction which is obviously a correct statement of the law applicable, at least, to *one* of the separate claims, "is not applicable to *any* issue in the case"?

12. Does a United States Court of Appeals accord to an appellee the "due process of law" to which such appellee is entitled, in an *appellate* court, when it makes *insupportable* statements in respect of inferences which "*might*" be deduced from the competent, relevant and material evidence in the record; and, in fact, *not* justified by the testimony as a whole or by that of *any* witness; or to rule that *one* clause, or, in fact, *a single word* ["fault"] of an instruction, which *may* or may *not* be *actually* erroneous, and has *not* been adequately and properly excepted to, is a *prejudicial* error for "reasons" which have *no* actual foundation in the *record* on appeal; and are based exclusively upon an *unsupported* assumption that the sworn judges of the disputed issues of fact were not only willing to but actually did consciously violate their solemn oaths? [*Frank v. Mangum*, 237 U.S. 309, *327*, 59 L. ed. 969, 980; *State ex rel. Berry v. Hummel*, Ohio App. 1944, 59 N.E. 2d 238; *Bracey v. Gray*, 71 C.A. 2d 206, 162 P. 2d 314, Cert. den., 327 U.S. 809, 90 L. ed. 1033.]

13. Was the appellee entitled to have its petition for rehearing considered and ruled upon by the nine active Circuit Judges constituting, as a whole, the *statutory* United States Court of Appeals for the Ninth Circuit, or are these Judges lawfully authorized to create *three*

separate and distinct "three-Judge" United States Courts of Appeals for the Ninth Circuit, each one *independently* autonomous from start to finish in respect of *every* case or controversy clearly within the *statutory* appellate jurisdiction of the Court as a whole; to the extent that the "three-judge" panel or division may, like the "dog in the manger", *arbitrarily* prevent the Court as a whole from considering or determining the vital and substantial question whether a petition for rehearing should or should not be granted? [*Western Pac. R. Corp. v. Western Pac. R. Co.*, 345 U.S. 247.]

1(d) THE CONSTITUTIONAL PROVISIONS AND STATUTES WHICH THE CASE INVOLVES.

The provisions are lengthy; are set forth *verbatim* in Appendix B, infra; and are merely cited here, as follows:

A. Constitution of the United States: Article I, Sections 1, 7, 8 [clauses 3, 9 and 18]; Article II, Section 2 [Second paragraph]; Article III, Sections 1 and 2 [Paragraphs 1 and 2]; Article IV, Section 4; Article VI [Paragraphs 2 and 3]; Article VII; Amendment V [the "due process of law" part thereof]; Amendment VII; Amendment IX; Amendment X; Amendment XIV. ["The constitution of the United States of America", Prepared by the Legislative Reference Service, Library of Congress, United States Government Printing Office, Washington, D.C. 1953; pp. 19, 23, 24, 25, 29, 30, 33, 40, 41, 45, respectively.]

B. Statutes Enacted by Congress: Act of July 20, 1790, c. 23, § 3, 1. Statutes at Large 132; Act of July 30,

1840, c 48, 5 Statutes at Large 396; Act of June 26, 1884, c. 121, § 4, 23, Statutes at Large 54; Act of December 21, 1898, c. 28 §§ 7, 8, 9, 10, 11, 13, 14, 15, 26, 30 Statutes at Large 757-764; Act of July 1, 1902, c. 1370, 32 Statutes at Large 712; Act of August 14, 1912, c. 288, 37 Statutes at Large 309; Act of March 4, 1915, c. 153, §§ 5, 13, 38 Statutes at Large 1165; Act of April 5, 1906, c. 1366, § 3, 34 Statutes at Large 100; Revised Statutes § 4563; Act of June 25, 1936, C. 816, §§ 4, 49 Statutes at Large 1935; Revised Statutes §§ 4565; 4566; 4567; 4568; 4572.

These statutes are very lengthy. The principal purpose of citing them is to show that the *statutory* admiralty law of the United States, with respect to unseaworthiness of a vessel [not noticed or discussed by this Court in *Mahnich v. Southern S.S. Co.*, 321 U.S. 96 or *Seas Shipping Co. v. Sieracki*, 328 U.S. 85], enacted by the Congress in pursuance of its legislative power and, therefore, the supreme Law of the Land, was, at the time of the decisions in the "Mahnich" and "Sieracki" cases, as well as at the time of the decision in "The Osceola", 189 U.S. 158, the *same*, in effect, as that of England [Statutes 39 & 40, Victoria, 1876, Chapter 80, pp. 493, et seq., specifically referred to in "The Osceola"]; *and* that a violation of the requirements of said statutes has always been the basis of a private or civil cause of action if an injured seaman could allege and prove actionable negligence on the part of the shipowner. [*Nashville Milk Co. v. Carnation Co.*, 355 U.S. ___, 2 L. ed. 2d 340, 70 S. Ct. ___, decided January 20, 1958.]

1(e) STATEMENT OF THE CASE.

"Appellant [in the Court of Appeals; Respondent here] *based* his case on the theory that the greasy deck was *caused* by the *negligence* of appellee and *rendered* its ship unseaworthy (R. 4-5)." [Appellant's Opening Brief, p. 2.]

Petitioner denied the bases of Respondent's [here] claim and also averred that Respondent's injuries were directly and proximately caused by his own negligence, in specified particulars. [R. pp. 3-9.] The case was submitted to the jury on *both* issues. [R. pp. 167-193.] The jury rendered a general verdict in favor of respondent, and judgment was entered thereon. [R. pp. 13-14.] It was agreed by all parties that there was no claim that *any* appliance, including the winch and topping lift wire, was defective. [R. pp. 189, 192.]

In the opinion which was filed November 21, 1957, the Division of the Court below, ignoring the uncontradicted evidence, and indulging in sheer surmise, guesswork and speculation, states as follows: "[There was no direct proof of how the grease got on the deck near the winch], but it might be inferred from the evidence that it came from lubrication of the winch or from a coiled wire fall which was on the deck between the winch and the deckhouse." [250 F. 2d 74, 75.] In the opinion of February 21, 1958, they did the same thing. [Supplemental R. p. 248.]

The uncontradicted evidence in the case and in the record with respect to this subject matter is as follows: The only evidence in the case with respect to "a coiled wire fall" is that there was a topping lift wire located

on the deck of the vessel between the port winch and the deck-house. Appellee's witness Berner testified that "it is the practice on ships to use a solution which consists of a graphite base and grease mixed together. That graphite keeps it from drying out entirely, but at the same time it is not in a liquid form. It is more in a paste form, and it is to preserve the wire against salt air and weather damage; in other words to stop it from rusting." If this dressing is applied, it will not become soft and run if sunlight is applied to it. "As time goes on, it will dry out, and it has to be renewed about every six or seven months. The wires must be redressed because this dries out, and it flakes off just like paint peeling, something like that, similar nature." (R. 157.) With respect to the winch referred to in the opinion, the uncontradicted evidence is as follows: The deck engineer on board the vessel oiled or greased the winch about every hour, to keep the winch in good operating condition. The grease used for that purpose, is a grease that is used in a grease gun. "They have fittings on the winch, regular patented grease fittings, and there is a hose on the end of this grease gun that has a ratchet affair that you lock onto this grease fitting, and you pump this gun, and when you disconnect the hose there is no grease that comes out of the gun. There is a ball bearing inside this grease fitting, and that shuts off the grease after pressure has been applied. There is a spring there that pushes this ball bearing against this patented grease fitting so that no grease can escape." (R. 160-161.) On the PEABODY the falls on the winch were not greased or dressed. When they are renewed, they are not dressed.

They are only dressed after they have been in use for some time. By "some time" I mean "for three or four weeks or so." I know of my own knowledge that the falls on the port winch on the No. 2 hatch of the W. H. PEABODY were not dressed. The falls were renewed on our arrival in Coos Bay at that time. The longshoremen claimed that the fall on the winch was unsafe so it was replaced with a new one. That was not dressed. (R. 161.)

[No witness who testified for the plaintiff or the defendant stated that there was any grease under any part of the port winch or under any part of the topping lift wire.] Yanow testified that he jumped down off the deck load; that "A peavey was over there, but there was a big pile, a blob of grease right here which I just, coming around the winch, I hit it, and I was sort of—I don't know, I don't remember too clearly what happened." (R. 35-36.) Yanow also testified that the "topping lift wire" was "laying right against the deck-house, between the deck-house and the winch." (R. 37.) [The foregoing is from Yanow's direct examination.] He could not answer the question whether it is a grease or oil base with which these topping lift wires are dressed. He did not know when this wire had been dressed or anything about its condition at that time. (R. 58.) Yanow testified that he did not see any spot or glob of grease at any time before he fell. After he fell, he looked around and saw a spot or glob of grease, about a foot [on direct examination] or about half a foot [on cross-examination] long, maybe, and three or four inches wide. He did not see this at any time before the accident; he saw it only after the accident. He said, "The guys helped me over and sat me

down on a shield of a steam line, and after I got my breath I looked over and saw then, you know, all that slopped—all messed up where I had slid and slipped in it." He then saw this oil or grease at the place where he said he slipped. (R. 59.) [The fact that, after he had slid and slipped in a foreign substance, it was about a foot long and about two or three inches in width does not prove or tend to prove that whatever he stepped in or slid or slipped in, was a foot or half a foot long or two or three inches in width at the instant he stepped in it. The essential fact in respect of Yanow's testimony is that he did not at any time say where this spot or glob of grease was in respect of the winch or the topping lift wire.]

Yanow testified that the point of the peavey was "lying close to the winch." (R. 37.) [He does not, in any part of his testimony, state whether the peavey was lying fore and aft, parallel with the keel line of the ship, or athwartship or at any other angle. Neither does he say where the spot or glob of grease was with reference to the peavey. There is no evidence in the record showing the distance from the port winch to deck-house. His testimony that he hit the blob of grease as he was "coming around the winch" does not support an inference that he was within any particular number of inches or feet from the winch. He does not state, in any part of his testimony, what winch he was referring to when he made the statement that he was "coming around the winch." The evidence shows without conflict that there were two winches in the space between No. 2 hatch coaming and the deck-house.]

The other witnesses who were called and testified on behalf of the plaintiff are the following: Hoy Hoover (R. 108-126); Dale Stokes (R. 126-131); Vieno Hanhi (R. 124-126) and Hugh C. Dingman (R. 132-136). Hoover testified that Yanow was behind the No. 2 winch on the left hand side of the vessel when he had fallen. (R. 110.) The only testimony given by Hoover with respect to grease was in substance as follows: I saw some oily grease, black in color, on the deck of the vessel and the approximate area of size of it was about a foot in diameter. (R. 110.)

[Hoover did not testify where this grease, circular in shape and about one foot in diameter, was with reference to either the No. 2 winch or the topping lift wire; or that there was any mark of any kind in that particular area of grease which might indicate that any man had slid through it or in it or had come in contact with it in any manner whatsoever or at all. In fact, Hoover does not state that the grease that he saw was between either winch and the bulkhead of the deck-house of the vessel.] All he says about Yanow is that "He was behind the No. 2 winch." (R. 110.) [This could have been anywhere between the No. 2 winch and the bulkhead of the house. There is no testimony in the record showing the distance between the No. 2 winch and the house referred to in the testimony. It might have been 10 feet or 100 feet, for all the record shows.]

Hanhi testified that he heard a noise and saw Yanow lying "Right behind the winch"; that afterwards he looked and saw the area where Yanow fell and that "there was some grease there." (R. 125.)

Stokes testified that he looked over "there" when Yanow fell and saw him "laying down there on the deck." Stokes went to the edge of the deck load and looked down. The area where Yanow had fallen "was back behind the winch on the port side back in [sic] No. 2, right behind the winch there." He saw grease on the deck. The area of the grease was "about a foot." He did not testify whether he meant that it was a foot long or a foot wide or give any other dimensions excepting that the area of the grease was "about a foot." (R. 128-129.) [Stokes did not testify that the grease he saw was under the winch or under the topping lift wire.] Significantly, Stokes testified in answer to a direct question that he did not know where this grease came from. (R. 131.)

Dingman testified that after they picked Yanow up and set him down on the steam guard, he noticed "that there was a blob of grease around there. It was all smeared up then." (R. 133-134.)

There is no testimony or evidence in the record showing, or from which it can be reasonably inferred, that the respondent occupied the status of a business invitee at the time of or the place where he slipped and fell.

The accident occurred within the aquatic domain of the State of Oregon, in the Port of Coos Bay, State of Oregon. [R. pp. 3-4.]

The instruction given by the trial judge to the jury, as a result of which the Court below reversed the entire judgment and set aside the entire verdict of the jury, is *not* set forth in full, in either opinion. It reads, as follows: "*Before* I take up the theory upon which plaintiff claims he is entitled to recover, I call your attention to

the fact that the defendant was not the insurer of the safety of the plaintiff. Just because an accident happened does not mean that, under the rules of law, there is any liability upon the Weyerhaeuser Steamship Company. In other words, the mere happening of an accident does not entitle the plaintiff to prevail in the *absence* of a *breach of duty* on the part of the defendant which caused or contributed to the injuries which plaintiff sustained. There are such things as unavoidable accidents—accidents which happen without the *fault* of anyone—and if you determine that such is the case here, then your deliberations will be at an end, and your verdict must be for the defendant even though the plaintiff was injured." [R. pp. 169-170.]

1(f) REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

1. The Court of Appeals has rendered a decision in conflict with the decisions of other Courts of Appeals on the same matter; in conflict with the decision of this Court in *"The Osceola"*; in conflict with the applicable provisions of the Constitution of the United States and valid statutes enacted by the Congress in pursuance of its authority; and in conflict with decisions of the highest Court of the State of California on the same matter.

2. The Court of Appeals has decided an important question of Federal law which has not been, but should be, settled by this Court.

3. The Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

1(g) BASIS OF JURISDICTION OF THE UNITED STATES DISTRICT COURT.

The action was commenced in the Circuit Court of the State of Oregon, for the County of Multnomah; and was removed therefrom, by reason of diversity of citizenship and sufficiency of the amount involved, to the United States District Court, for the District of Oregon. [Supplemental R. pp. 206-219.]

INTRODUCTION.

The basic questions of constitutional law involved in this case are premised upon the assumptions that, when "the Representatives of the United States of America, in General Congress, Assembled, appealing to the Supreme Judge of the World for the rectitude of our intentions, do, in the Name, and by Authority of the good people of these Colonies, solemnly publish and declare, That these United Colonies are, and of Right ought to be Free and Independent States; that they are Absolved from all Allegiance to the British Crown, and that all political connection between them and the State of Great Britain, is and ought to be totally dissolved; and that as Free and Independent States, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do" as is set forth in the Declaration of Independence, July 4, 1776, *all* absolute sovereign powers [legislative, executive and judicial] in respect of the *territorial and aquatic* domains of each of the British Colonies in America which thereby became

free, *independent and sovereign* States, were then assumed by and vested exclusively in the enfranchised citizens of said States; and, ever since July 4, 1776, have been and now are vested in the enfranchised citizens of said States and those of the thirty-five States which have subsequently joined the Union, with the exception of those *specific* elements of legislative, executive and judicial sovereign powers which have been *expressly* delegated by them to the legislative, executive and judicial departments of the States, pursuant to the texts of the various State Constitutions; and the legislative, executive and judicial departments of the United States of America pursuant to the text of the Constitution of the United States. The *original* delegations, ante-dating the effective date of the Constitution of the United States, were those provided for in the Constitutions of the 12 States which had Constitutions on the date of the ratification of the Constitution of the United States of America, by a Convention of the ninth State to do so. The *second* delegations are those provided for in the Articles of Confederation. The *third* delegations *and reservations* are those provided for in the *text* of the Constitution of the United States of America in its original Articles and as amended from time to time up to date. What intellectually honest and ordinarily competent lawyer, on or off the bench, can controvert any of the foregoing assumptions?

The *court* created liability [imposed upon those citizens of the United States who own "vessels of the United States"; and corporations whose directors and officers are citizens of the United States and own such vessels,

the American Merchant Marine, and upon *all* other citizens and residents of the United States of America whose hard earned money is used, through income, excise and other taxes, to enable the United States of America to own and operate merchant vessels owned *by* the United States] for the benefit of seamen, longshoremen, carpenters, *et alteria,* pursuant to which such beneficiaries are entitled to recover "damages" *without* limit as to amount and irrespective of actionable negligence is a dual personality—a Doctor Jekyll and Mr. Hyde—unlimitedly solicitous of the beneficiaries and unlimitedly destructive of the American Merchant Marine. This "Frankenstein" plunged a fatal dagger into the heart of the present day judicially unfavored and condemned "employing class", who own or operate all units of the American Merchant Marine, as a result of the opinions in cases such as *"Mahnich"* and has made its ultimate demise and burial more certain by cutting its jugular vein as a result of the opinions in cases such as *"Sieracki"*. Thus, the heroic efforts of the Congress and its declarations that it was the public policy of the United States of America to create and maintain an American Merchant Marine, second to none anywhere else in the world, ultimately to be privately owned and operated, as set forth in the first section of the Merchant Marine Acts of 1920, 1928 and 1936, have been, at least in substantial measure, thwarted by judicial *fiats* which have *unconstitutionally* imposed an extraordinary, tremendous and *destructive* financial burden as a proximate result of this Court created *insurer's* liability, *without limit as to amount.* This cannot be *"judicially"* rationalized upon the as-

sumption that ship owner or operator corporations or marine insurance underwriters are eleemosynary institutions.

The plain fact that *all* taxes collected by the Department of the Treasury have their genesis in the "employing class" of this Nation, including the income taxes paid by *all* employees, and that without a financially strong and sound employing class this Nation could not possibly survive as a "Republican Form of Government" should not be overlooked or ignored in an effort to be overly liberal to injured or sick employees. Otherwise, we may "kill the goose that lays the golden eggs."

The *sole* lawful function of this Court in *all* of these cases was the *legitimate* exercise of *appellate* jurisdiction. No question of *public policy* was ever within that jurisdiction. This Court's function in all of these cases was to determine from and within the confines of the cold record on appeal whether or not any substantial prejudicial error of law was committed by an inferior Court to the detriment of the party whose petition for a writ of certiorari had been granted.

The marine insurance premiums are of necessity, principally because of the "workmen's compensation law" philosophy of *"Mahnich"* and *"Sieracki"*, rising *every* year; must be paid in cash and be sufficient to cover *all* risk of loss by the insurance companies and leave an underwriting profit. The ultimate cost of satisfying the demands resulting from wages to the end of the voyage, maintenance and care until cured, damages without limit, irrespective of negligence, is not imposed upon the supposedly unlimited treasuries of insurance companies. In

fact, no marine insurance underwriter will execute and deliver a protection and indemnity policy without including a "deductible" provision, pursuant to which the *insured* pays up to a specified amount of every claim before being entitled to call upon the insurer. These deductibles run all the way from $500 to $10,000, and are usually determined by the previous loss ratio of each *particular* insured, and have helped in forcing quite a number of shipping companies out of business. "Nero fiddles while Rome burns."

No Workmen's Compensation Law has *ever* survived contentions that it was repugnant to the provisions of the "due process of law" clause of Amendment V, Amendment XIV, or of any State constitution, in that it purported to create and impose a liability, irrespective of actionable negligence, upon employers; or purported to withdraw from employees suffering injury in the course of their employment the common-law right of action for damages, and their common-law right to trial by jury; or to deprive employers of their common-law right to have a jury determine whether they were or were not liable in damages, *unless* the statute provided a reasonable equivalent of or substitute for the common-law rights, liabilities and defenses it purported to eliminate from the relationship of employer and employee. In most cases, the *Constitutions* of the various States had to be amended in order to authorize legislation in respect of the imposition of compulsory liability, irrespective of negligence on the part of either employer or employee; and requiring the employees to accept compensation benefits in *limited* amounts as their sole and exclusive remedy. These work-

men's compensation laws, enacted by the *legislative* departments of the various States,—not *created* by the *courts* of any State,—which have been held constitutional by the State courts and by *this* Court, *compulsorily* imposed the liability upon the *entire* body of employers subject to the *intrastate* legislative power of the State; required the procurement of workmen's compensation insurance by *every* individual employer to secure the payment of the compensation benefits, thus spreading the risk, by *law*, throughout the entire employing class or reasonable segregations thereof in specified industries as a class; and compelled the injured employee to accept the *limited* benefits as his sole and exclusive remedy. Courts, the incumbent judges of which were not actuated by a hatred of or prejudice against the employing or employed classes, have written judicial,—not "legislative",—lawyer-like and clearly impartial opinions in respect of this subject matter in the following, *inter alia*, cases [*New York Central Railroad Co. v. White*, 243 U.S. 188, 61 L. ed. 667; *Madera Sugar Pine Co. v. I.A.C. of the State of California*, 262 U.S. 499, 67 L. ed. 1091; *Alaska Packers Assoc. v. I.A.C. of California*, 1 Cal. 2d 250, 34 Pac. 2d 716, 294 U.S. 532, 79 L. ed. 1044; *Employers Liability Assur. Corp., Ltd., v. I.A.C. of California*, 179 C. 432, 177 P. 273; *Miller & Lux, Inc. v. I.A.C. of California*, 179 C. 764, 178 P. 960, 7 A.L.R. 1291; *Perry v. I.A.C. of California*, 180 C. 497, 181 P. 788; *Flickenger v. I.A.C.*, 181 C. 425, 184 P. 851, 19 A.L.R. 1150; *Worswick Street & Paving Co. v. I.A.C.*, 181 C. 550, 185 P. 953, Id. 181 C. 785, 185 P. 958, and *Provensano v. Div. of Industrial Accident and Safety Department of Industrial Relations of California*, 110 C.A. 239, 294 P. 71.]

Premised upon the clear enunciations of the courts in the above cited cases, it is the contention of petitioner that if the Congress of the United States had enacted a "Seaman's Workmen's Compensation Act" in the exact language used by the numerical majority in the *"Mahnich"* or *"Sieracki"* opinions, imposing liability without fault or negligence upon *each* ship-owner or ship-operator as an *individual;* not upon the shipping industry as a whole; for the *"one-sided"* benefit of seamen, longshoremen and other harbor workers, respectively; and with the "sky as the limit" in respect to the amount of money which these workers can collect, such statute would be clearly and incontrovertibly *unconstitutional,* even if it were restricted to the employer-employee relationship within the area of interstate or foreign commerce.

Pursuant to what *authority* vested in them as judges of a court of appellate jurisdiction, or in the nine judges of the court as a whole, by the actual *text* of the Constitution and its Amendments, or by *any* "Law of the United States made in Pursuance thereof", by the *Congress,* did a numerical majority of the judicial personnel of this Court assemble, *ad hoc* or *pro hac vice,* as a session of the Congress of the United States; and *create* by judicial fiat in *"Mahnich"* and *"Sieracki"*, and similar opinions, theretofore unknown and unheard of substantive rights of action in the form of a Workmen's Compensation Law which could not have been validly enacted by the Congress?

This is the same type of *unconstitutional* assumption of sovereign legislative power which was condemned as such,

over the vigorous protest of the "legislatively" inclined members of the Court in the famous case *of Erie R. C. v. Tompkins*, 304 U.S. 64, 82 L. ed. 1188, and should meet the same fate in the case at bar. It is time to put on the brakes and erase the mistakes of the past in respect of this *vital* subject matter; which affect not only the petitioner but *the public interest in the survival of the American Merchant Marine.* A casual reading of the Congressional Record on the subject of shipping will demonstrate that the *privately* financed and operated American Merchant Marine is on its "death-bed". Unjustifiable items of expense are, in substantial measure, responsible.

I. The part of the opinion of the court below quoted in Question 8, supra, p. 11, is in clear and irreconcilable conflict with the opinions, upon the same subject matter, of those of the Third Circuit, in *Cookingham v. U. S.*, 184 F. 2d 213, Cert. Den. 304 U.S. 935; *Ross v. S. S. Zeeland*, Fourth Circuit, 240 F. 2d 820; *Poignant v. U. S.*, Second Circuit, 225 F. 2d 595, and those of California courts in *Gladstone v. Matson Navigation Company*, 124 C.A. 2d 493, 269 P. 2d 37, *Gladstone's* petition for a rehearing denied May 12, 1954, and her petition for a hearing by the Supreme Court of California, denied June 9, 1954; and *Blodow v. Pan Pacific Fisheries, Inc.*, 128 C.A. 2d 428, 275 P. 2d 795, *Blodow's* petition for a hearing by the Supreme Court of California, denied December 22, 1934; and a substantial number of additional cases cited in Shepard's Federal Reporter Citations in respect of the *Cookingham* case. It is impossible to maintain the supposedly required uniformity when such diametrically opposed opinions exist as between the U. S. Courts of Ap-

peals in the various circuits and the courts of the State of California. This conflict should be eliminated by this Court as it affects the administration of the admiralty and maritime jurisdiction throughout the courts of the nation and is an ever present source of argument and disagreement. This Court has written no opinion on this particular subject matter; but should do so *now*. There is no doubt about the fact that the Ninth Circuit disagrees with the doctrine of the *Cookingham* case. [*Johnson Line v. Maloney*, 243 F. 2d 293, 294.] This case also demonstrates the fallacious opinion of the Ninth Circuit that it is a "judicial *principality*" separate from the rest of the nation.

II. The opinion of the court below is in direct and irreconcilable conflict with the opinion of a unanimous Court in *"The Osceola"*, 189 U.S. 158-177. It has been *assumed* by this Court and many of the inferior federal courts that the Supreme Court, in *"The Osceola"* held that a ship-owner or operator was liable, irrespective of actionable negligence, for all injuries suffered by any seaman, in the service of the ship, in consequence of the "unseaworthiness of the ship or a failure to supply and keep in order the proper appliances appurtenant to the ship." In the first paragraph of the opinion, the court stated as follows:

"As this is a liable *in rem* it is *unnecessary* to determine whether the owners *would* be liable to an action *in personam* either in admiralty *or* at common law, although cases upon this subject are not wholly irrelevant. [Therefore *everything* said in the opinion about *in personam* liability was classic *obiter dicta*.]

"If the rulings of the District Court were correct, that the vessel was liable *in rem* for these injuries, such liability *must* be founded either upon the general admiralty law, or upon the local *statute* of the state in which the accident occurred."

The opinion in *"The Osceola"* is saturated with *obiter dicta*. In addition, it refers to *many* statutes, in *foreign* languages, enacted by foreign sovereigns, none of which could by any possible stretch of logic be assumed to have been adopted by the people of the United States of America who spoke, read and wrote *only* the English language. The "Rules of Oleron", the "Laws of Wisbury", the "Laws of the Hanse Towns", and the "Marine Ordinances of Louis XIV" could be of importance if a seaman happened to be injured in a jurisdiction where such foreign language statutes were applicable, but not otherwise. Therefore, these foreign language statutes should not even be mentioned in any opinion written by any court of appellate jurisdiction within the United States of America, unless the particular action is based upon the substantive foreign law by reason of the fact that the injury occurred within and subject to the statutes of the foreign jurisdiction.

Every decision cited in *"The Osceola"* was and is completely irrelevant in respect of ascertaining what the *common*, unwritten admiralty or maritime law was immediately or at any time prior to the time of the ratification of our Constitution because *none* of them was written *prior* to the time of said ratification; and, therefore, do not constitute the slightest evidence of what the common admiralty and maritime law *was*, prior to or at said time,

in respect of the subject matter of the liability of a ship-owner or ship operator by reason of personal injuries suffered by a seaman, in consequence of the unseaworthiness of a ship or a failure on the part of the owner or ship operator to supply and keep in order the proper appliances appurtenant to the ship. What the law was, on this subject, prior and up to the ratification of the Constitution, *cannot* be ascertained by gazing into a crystal ball. It can be ascertained by examining the original Constitutions, statutes and reported opinions of courts of competent jurisdiction written and recorded during the time involved. In addition, every one of the cases cited in *"The Osceola"* was bottomed squarely and exclusively upon the common-law doctrine that an employer was always liable in damages in the event his employee, acting in the course of his employment, suffered an injury as the proximate result of a negligent failure on the part of the employer, or his "agent-vice-principal" to provide a reasonably safe place to work and reasonably safe tools and appliances with which to do the work.

One sentence in the opinion, if read casually and *carelessly*, can be the source of considerable misunderstanding. Referring to the case of *"The A. Heaton"* 43 Fed. 592, the Court said: "The case, however, was one of injuries arising from unseaworthiness, although the learned judge in his discussion does not draw a distinction between the cases arising from the unseaworthiness of the ship and the negligent act of the *Master*". [189 U.S. at p. 174.] The word, "master" was not used for the purpose of talking about the "employer"; the court was talking about the captain of the ship.

The entire discussion, and the effect of *all* of the cases referred to, and *also* the English Merchants Shipping Act of 1876, is summed up by the court as follows:

"Upon a full review, however, of *English* and *American* authorities upon these questions, we think the law may be considered as settled upon the following propositions: (1) that the vessel and her owners are liable, in case a seaman falls sick, or is wounded in the service of the ship, to the extent of his maintenance and cure, and to his wages, at least so long as the voyage is continued.

"(2) That the vessel and her owner are, *both* by *English and American* law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship. *Scarff v. Metcalf*, 107 N.Y. 211, 13 N.E. 796.

"(3) That all the members of the crew, except *perhaps*, the master, are, as between themselves, fellow-servants, and hence seamen cannot recover for injuries sustained through the negligence of another member of the crew beyond the expense of his maintenance and cure.

"(4) That the seaman is not allowed to recover an indemnity for the negligence of the master, [the captain] or any member of the crew, but is entitled to maintenance and cure, whether the injuries were received by negligence or accident.

"It will be observed in *these* cases that a *departure* has been made from the *Continental* Codes in allowing an indemnity beyond the expense of maintenance and cure in cases arising from *unseaworthiness*. [This was *not* in-

volved in the case at all, because *everybody* admitted that the *appliances* involved in Shea's injury were perfect!] This departure *originated* in England in the merchants' shipping act of 1876, above quoted [citing cases], and in this country, in a general consensus of *opinion* among the circuit and district courts, that an *exception* should be made from the general principle *before* [*when*, with respect to the ratification of the Constitution?] obtaining, in favor of seamen suffering injuries through the unseaworthiness of the vessel. We are not disposed to disturb so wholesome a doctrine by any contrary decision of our own."

The fact, which has been overlooked too often, is that in *none* of the cases referred to in *"The Osceola"*, was the owner ever held liable, irrespective of *actionable negligence*, to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship.

The obvious significance, in *"The Osceola"*, of the act of the court in citing the decision of the New York Court of Appeals in the case of *Scarff v. Metcalf*, as part and parcel of subdivision 2, has been entirely overlooked. Why did the Supreme Court cite this *single* case, a common-law *actionable negligence* case, at the end of subdivision 2, and as part of it, if it had the slightest intention of holding that subdivision 2 was intended to establish liability on the part of a ship-owner or ship-operator, as an insurer, irrespective of negligence, in respect of injuries suffered by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep

in order the proper appliances appurtenant to the ship? Why did the court also *ex industria* direct the attention of all of the then incumbent judges of inferior federal courts, their successors and to all, *in futuro*, judicial personnel of the Supreme Court, to the proposition that it *required* an Act of the British Parliament, in the year *1876*, to originate and create a right or cause of action in respect of damages suffered as a result of the unseaworthiness of a vessel at the commencement of a voyage, and that the *basis* of the right of action was *actionable* negligence on the part of the owner of the ship; and thereby hoist and vigorously wave a red flag or stop-sign showing that the creation of such right of action was a legislative, not judicial, function?

The unanimous opinion of the same court in *"The Iroquois"*, 194 U.S. 240, is also very important. In that case, the court referred to one of the matters which it held was a legal duty imposed upon ship-owners by the common or general admiralty and maritime law of the United States. It stated as follows: "The *duty* to provide proper medical treatment and attention for seamen falling ill or suffering injury in the service of the ship has been imposed upon the ship-owners by all maritime nations. It appears in the earliest *codes* [statutory law] of Continental *Europe* and was expressly recognized by this Court in the recent case of *'The Osceola'*, 189 U.S. 158." [194 U.S. pp. 241-242.] The court held, in affirming the judgments of the lower courts, that there was no liability, as an insurer, imposed upon the ship-owner by reason of a mere breach of the "common admiralty and maritime law" *duty* to provide proper medical care to a

mate injured in the service of the ship; but that the liability for consequential damages depended upon proof of *actionable negligence* on the part of the captain of the ship. There is no logical basis for holding that a *mere* and non-negligent breach of a legal duty to furnish a seaworthy ship results in liability, but that the non-negligent breach of the *more important duty* to provide necessary and proper medical care to a seriously ill or injured seaman does *not*, in and of itself, result in liability. *Consistency* seems to be absent more often in the "opinions" of courts than anywhere else!

III. With respect to Question 9, supra, pp. 11-12; petitioner requested the court below to clarify its intention. [Supplemental R. pp. 237-238.] This request was ignored.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner.

(Appendices A and B Follow.)

Appendix A

United States Court of Appeals
for the Ninth Circuit

Harold Yanow, Appellant, vs. Weyerhaeuser Steamship Company, a corporation, Appellee.	No. 15,452 Nov. 21, 1957

Appeal from the United States District Court
for the District of Oregon

Before: DENMAN, Senior Circuit Judge and BARNES and HAMLEY, Circuit Judges

DENMAN, Senior Circuit Judge:

Yanow appeals from a judgment in a jury-tried case holding that the steamship company is not liable for injuries he alleged he received by slipping on grease on the deck of the steamship company's steamship, the W. H. PEABODY.

The evidence shows that Yanow was working as a longshoreman at Coos Bay, Oregon, on August 1, 1954, aboard appellee's vessel the W. H. PEABODY, a 10,000 ton Liberty Ship. The gang he was working with was engaged

in stowing the deck load of lumber at No. 2 hatch. This involved moving loads of lumber on rollers into position where the men were working to build up the level of the "floor". A load of lumber had just been landed and appellant needed a peavey to facilitate his work. He went to get one behind the No. 2 port winch and there is strong testimony, if it be believed, that as he walked by the winch he slipped on a "blob of grease" and fell, striking his back on part of the winch on the way down.

As a result of this fall, there is evidence that the appellant aggravated a previous back condition and sustained a bruised back, a bumped head, and had the wind knocked out of him.

There was no direct proof of how the grease got on the deck near the winch, but it might be inferred from the evidence that it came from lubrication of the winch or from a coiled wire fall which was on the deck between the winch and the deckhouse.

There is no question that there was evidence warranting a verdict for Yanow for it is now a long established law that a shipowner is liable to a stevedore loading its vessel if it be unseaworthy as to its decks by the presence thereon of sufficient oil or grease to make it slippery to one walking over it, and the stevedore is injured thereby. The liability exists although the shipowner has no knowledge of the presence of the oil or grease. The Osceola, 189 U.S. 158; Seas Shipping Co. v. Sieracki, 328 U.S. 25.

Yanow contends that two erroneous instructions given and a refusal to give a requested instruction so prejudiced his case with the jury that he is entitled to a new trial.

The first instruction complained of is obviously wrong since Yanow's contention was that unseaworthiness could create liability without "fault of anyone." It is:

> "Just because an accident happened does not mean that, under the rules of law, there is any liability upon the Weyerhaeuser Steamship Company. In other words, the mere happening of an accident does not entitle the plaintiff to prevail in the absence of a breach of duty on the part of the defendant which caused or contributed to the injuries which plaintiff sustained. There are such things as unavoidable accident—*accidents which happen without the fault of anyone*—and if you determine that such is the case here, *then your deliberations will be at an end*, and your verdict must be for the defendant even though the plaintiff was injured." [Emphasis added.]

After this instruction on unavoidable accident had been given to the jury, the attorneys repaired to the court's chambers where the following occurred:

> "Mr. Peterson: Plaintiff excepts to the court's instruction to the jury, in substance, that if this was an unavoidable accident the plaintiff cannot recover. The point of my exception is that the unavoidable accident instruction in this kind of a situation is completely beside any issue in the case.
>
> "The Court: Is that true? Do you think that unavoidable accident should be given?
>
> "Mr. Lister: Well, Your Honor, I think as part of it that, technically, unavoidable accident would be the terminology, but I don't see the point you are making.
>
> "The Court: I am just asking; and if you want to delete it, I will delete it.

"Mr. Lister: No.
"The Court: Very well."

Pertinent to this instruction are the facts that the trial occupied the whole day. The transcription shows that the case went to the jury late in the afternoon after 104 pages of testimony had been given and 20 exhibits introduced since the luncheon recess, 62 pages being of complicated opposing expert evidence by physicians describing the extent of Yanow's injuries, a matter relative to the amount of his damages. The wrongful opening instruction was followed by instruction covering the extent of 12 pages of the printed transcript.

In this situation the statement "then your deliberations will be at an end" gave an easy out for the jurors to escape from the possibility of being locked up for the night and the certainty of a long session over the evidence of damages, if they were forced to consider the evidence of the cause thereof.

With the insistence of the shipowner that the instruction must be given over the objection of Yanow, we hold that the effect of this instruction was not cured by other statements in the instructions.

Since the case may be retried and it is likely that the same questions may arise as to the plaintiff's refused instruction and the other instruction excepted to, they are here considered. The court gave the following instructions:

> "You have heard the testimony and the other evidence, and I leave it to you to determine whether plaintiff has proved by a preponderance of the evi-

dence that oil and grease were permitted to collect on the deck forward of the port winch at No. 2 hatch and whether the quantity of oil and grease, if any, that was permitted to collect rendered the vessel unseaworthy."

The Court refused appellant's requested instruction No. 6:

Requested Instruction No. 6

"In this case if you find that there was oil and grease collected on the deck forward of the port winch at Hatch No. 2, or that the topping lift wire for the port boom at Hatch No. 2 was not kept secured, then you will find the steamship SS W. H. Peabody unseaworthy. If you further find that plaintiff was injured as a proximate and contributing result of the unseaworthiness of the vessel, then your verdict will be in favor of the plaintiff and against the defendant corporation."

Counsel for appellant made his objections as follows:

"Plaintiff further excepts to the Court's failure to give Plaintiff's Requested Instruction No. 6, which is an instruction that if they find that there was oil and grease collected on the deck forward of the port winch at Hatch No. 2, and I have also put in there that if they find that the topping lift wire for the port boom at Hatch No. 2 was not kept secured, then they are to find the steamship SS W. H. Peabody unseaworthy.

"The plaintiff excepts to the Court's failure to instruct the jury either as to the grease and oil on the deck or the unsecured topping lift."

So far as concerns the topping lift wire the court properly stated that it was not shown to have contributed to the injury to Yanow. The sentence, "In this case if you find that there was oil and grease collected on the deck forward of the port winch at Hatch No. 2 . . . then you will find the Steamship W. H. Peabody unseaworthy" does not state the law since under this sentence any amount of grease however slight would constitute unseaworthiness. The court's instruction quoted above is properly based on "the quantity of oil and grease."

The judgment is reversed.

(Endorsed:) Opinion. Filed Nov. 27, 1957.

Paul P. O'Brien, Clerk.

United States Court of Appeals
for the Ninth Circuit

Harold Yanow, Appellant, vs. Weyerhaeuser Steamship Company, a corporation, Appellee.	No. 15,452

JUDGMENT

Appeal from the United States District Court for the District of Oregon.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Oregon, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is reversed, with costs in favor of the Appellant and against the Appellee.

It is further ordered and adjudged by this Court, that the Appellant recover against the Appellee for his costs herein expended and have execution therefor.

(Endorsed) Judgment

Filed and entered: November 21, 1957.

Paul P. O'Brien, Clerk.

United States Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Friday, January 17, 1958

Before: Denman, Barnes & Hamley, Circuit Judges

ORDER DENYING PETITION FOR REHEARING

On consideration thereof, and by direction of the Court, it is ordered that the petition of Appellee, filed December 23, 1957, and within time allowed therefor by rule of Court for a rehearing of the above cause, be, and hereby is denied.

United States Court of Appeals
for the Ninth Circuit

Harold Yanow, Appellant, vs. Weyerhaeuser Steamship Company, a corporation, Appellee.	No. 15,452

Before: DENMAN, BARNES and HAMLEY, Circuit Judges

DENMAN, Circuit Judge:

IT IS ORDERED that our opinion of November 21, 1957 and the judgment therein be set aside and the following opinion and its decision be filed.

This case was transferred from the Circuit Court of the State of Oregon, County of Multnomah, to the United States District Court for the State of Oregon on the verified petition of the Weyerhaeuser Steamship Company, of which we take judicial notice, alleging as follows:

"At all times during July, 1954, and at all times since then defendant was and now is a corporation organized and existing exclusively pursuant to the laws of the State of Delaware and on July 31, 1954, petitioner was and at all times since has been and now is exclusively a citizen of the State of Delaware. Petitioner was not at any time hereinabove mentioned nor is it now a citizen of the State of Oregon.

"That at all times hereinabove mentioned plaintiff, Harold Yanow, was and now is a citizen and resident of and domiciled in the State of Oregon."

Plaintiff Yanow appeared and moved for a jury trial thereby accepting as true the allegations creating the diversity jurisdiction.

He appeals from a judgment in which the verdict held the steamship company not to be liable for injuries he alleged he received by slipping on grease on the deck of the steamship company's steamship, the W. H. PEABODY. He complied with Fed. R. Civ. P. 75(d) in stating his points on appeal.

It is further ordered that the remainder of our opinion is that of November 21, 1957, after the first paragraph thereof save that the last sentence of the paragraph beginning second on page two is amended to read as follows: "The liability exists although the shipowner has no knowledge of the presence of the oil or grease. The Osceola, 189 U.S. 158; Seas Shipping Co. v. Sieracki, 328 U.S. 85; Boudoin v. Lykes Bros. S.S. Co., 348 U.S. 336, 340. Since Yanow was injured on the ship on navigable waters, his rights are determined by maritime and not state law. Pope and Talbot v. Hawn, 346 U.S. 406, 409.[1]"

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[1]In the recent case of Kerman v. American Dredging Co., ___ U.S. ___, No. 34, decided February 3, 1958 the court declined to pass on the contention that unseaworthiness causing the death of a seaman creates liability in the ship or owners, four of the dissenting judges stating that such unseaworthiness created no liability for death. Eight of the justices in the Boudoin case sat in the Kerman case. No mention is made of The Osceola, Sieracki and Boudoin cases recognizing such liability for personal injury of the seaman and stevedore. We do not regard the Kerman decision on the liability for death as affecting the Supreme Court cases recognizing the liability for personal injury from unseaworthiness.

As above provided, the opinion is to be printed in full and judgment entered thereon.

/S/ William Denman
/S/ Stanley N. Barnes
/S/ Frederick G. Hamley
Circuit Judges

(Endorsed:) Filed Feb. 21, 1958.
Paul P. O'Brien, Clerk.

United States Court of Appeals
for the Ninth Circuit

Harold Yanow, Appellant, vs. Weyerhaeuser Steamship Company, Appellee.	No. 15,452

JUDGMENT

APPEAL from the United States District Court for the District of Oregon.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Oregon and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed with costs in favor of the appellant and against the appellee.

It is further ordered and adjudged by this court, that the appellant recover against the appellee for his costs herein expended, and have execution therefor.

Filed and entered February 21, 1958.

United States Court of Appeals
For the Ninth Circuit

Harold Yanow,
Appellant,
vs.
Weyerhaeuser Steamship Company,
a corporation,
Appellee.

No. 15,452
Nov. 21, 1957
as amended
Feb. 21, 1958

Appeal from the United States District Court
for the District of Oregon

Before: DENMAN, Senior Circuit Judge and BARNES and HAMLEY, Circuit Judges

DENMAN, Senior Circuit Judge:

This case was transferred from the Circuit Court of the State of Oregon, County of Multnomah, to the United States District Court for the State of Oregon on the verified petition of the Weyerhaeuser Steamship Company, of which we take judicial notice, alleging as follows:

> "At all times during July, 1954, and at all times since then defendant was and now is a corporation organized and existing exclusively pursuant to the laws of the State of Delaware and on July 31, 1954, petitioner was and at all times since has been and now is exclusively a citizen of the State of Delaware. Petitioner was not at any time hereinabove mentioned nor is it now a citizen of the State of Oregon.

> "That at all times hereinabove mentioned plaintiff, Harold Yanow, was and now is a citizen and resident of and domiciled in the State of Oregon."

Plaintiff Yanow appeared and moved for a jury trial thereby accepting as true the allegations creating the diversity jurisdiction.

He appeals from a judgment in which the verdict held the steamship company not to be liable for injuries he alleged he received by slipping on grease on the deck of the steamship company's steamship, the W. H. PEABODY. He complied with Fed. R. Civ. P. 75(d) in stating his points on appeal.

The evidence shows that Yanow was working as a longshoreman at Coos Bay, Oregon, on August 1, 1954, aboard appellee's vessel the W. H. PEABODY, a 10,000 ton Liberty Ship. The gang he was working with was engaged in stowing the deck load of lumber at No. 2 hatch. This involved moving loads of lumber on rollers into position where the men were working to build up the level of the "floor". A load of lumber had just been landed and appellant needed a peavey to facilitate his work. He went to get one behind the No. 2 port winch and there is strong testimony, if it be believed, that as he walked by the winch he slipped on a "blob of grease" and fell, striking his back on part of the winch on the way down.

As a result of this fall, there is evidence that the appellant aggravated a previous back condition and sustained a bruised back, a bumped head, and had the wind knocked out of him.

There was no direct proof of how the grease got on the deck near the winch, but it might be inferred from the evidence that it came from lubrication of the winch or from a coiled wire fall which was on the deck between the winch and the deckhouse.

There is no question that there was evidence warranting a verdict for Yanow for it is now a long established law that a shipowner is liable to a stevedore loading its vessel if it be unseaworthy as to its decks by the presence thereon of sufficient oil or grease to make it slippery to one walking over it, and the stevedore is injured thereby. The liability exists although the shipowner has no knowledge of the presence of the oil or grease. The Osceola, 189 U.S. 158; Seas Shipping Co. v. Sieracki, 328 U.S. 85; Boudoin v. Likes Bros, S.S. Co., 348 U.S. 336, 340. Since Yanow was injured on the ship on navigable waters, his rights are determined by maritime and not state law. Pope and Talbot v. Hawn, 346 U.S. 406, 409.[1]

Yanow contends that two erroneous instructions given and a refusal to give a requested instruction so prejudiced his case with the jury that he is entitled to a new trial.

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[1]In the recent case of Kernan v. American Dredging Co., ___ U.S. ....., No. 34, decided February 3, 1958 the court declined to pass on the contention that unseaworthiness causing the *death* of a seaman creates liability in the ship or owners, four of the dissenting judges stating that such unseaworthiness created no liability for *death*. Eight of the justices in the Boudoin case sat in the Kernan case. No mention is made of The Osceola, Sierecki and Boudoin cases recognizing such liability for *personal injury* of the seaman and stevedore. We do not regard the Kernan decision on the liability for death as affecting the Supreme Court cases recognizing the liability for personal injury from unseaworthiness.

The first instruction complained of is obviously wrong since Yanow's contention was that unseaworthiness could create liability without "fault of anyone." It is:

> "Just because an accident happened does not mean that, under the rules of law, there is any liability upon the Weyerhaeuser Steamship Company. In other words, the mere happening of an accident does not entitle the plaintiff to prevail in the absence of a breach of duty on the part of the defendant which caused or contributed to the injuries which plaintiff sustained. There are such things as unavoidable accidents—*accidents which happen without the fault of anyone*—and if you determine that such is the case here, *then your deliberations will be at an end,* and your verdict must be for the defendant even though the plaintiff was injured." [Emphasis added.]

After this instruction on unavoidable accident had been given to the jury, the attorneys repaired to the court's chambers where the following occurred:

> "Mr. Peterson: Plaintiff excepts to the court's instruction to the jury, in substance, that if this was an unavoidable accident the plaintiff cannot recover. The point of my exception is that the unavoidable accident instruction in this kind of a situation is completely beside any issue in the case.
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> "The Court: Is that true? Do you think that unavoidable accident should be given?
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> "Mr. Lister: Well, your Honor, I think as a part of it that, technically, unavoidable accident would be the terminology, but I don't see the point you are making.
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> "The Court: I am just asking; and if you want to delete it, I will delete it.

"Mr. Lister: No.
"The Court: Very well."

Pertinent to this instruction are the facts that the trial occupied the whole day. The transcript shows that the case went to the jury late in the afternoon after 104 pages of testimony had been given and 20 exhibits introduced since the luncheon recess, 62 pages being of complicated opposing expert evidence by physicians describing the extent of Yanow's injuries, a matter relative to the amount of his damages. The wrongful opening instruction was followed by instruction covering the extent of 12 pages of the printed transcript.

In this situation the statement "then your deliberations will be at an end" gave an easy out for the jurors to escape from the possibility of being locked up for the night and the certainty of a long session over the evidence of damages, if they were forced to consider the evidence of the cause thereof.

With the insistence of the shipowner that the instruction must be given over the objection of Yanow, we hold that the effect of this instruction was not cured by other statements in the instructions.

Since the case may be retried and it is likely that the same questions may arise as to the plaintiff's refused instruction and the other instructions excepted to, they are here considered. The court gave the following instructions:

"You have heard the testimony and the other evidence, and I leave it to you to determine whether plaintiff has proved by a preponderance of the evi-

dence that oil and grease were permitted to collect on the deck forward of the port winch at No. 2 hatch and whether the quantity of oil and grease, if any that was permitted to collect rendered the vessel unseaworthy."

The Court refused appellant's requested instruction No. 6:

Requested Instruction No. 6.

"In this case if you find that there was oil and grease collected on the deck forward of the port winch at Hatch No. 2, or that the topping lift wire for the port boom at Hatch No. 2 was not kept secured, then you will find the steamship SS W. H. Peabody unseaworthy. If you further find that plaintiff was injured as a proximate and contributing result of the unseaworthiness of the vessel, then your verdict will be in favor of the plaintiff and against the defendant corporation."

Counsel for appellant made his objections as follows:

"Plaintiff further excepts to the Court's failure to give Plaintiff's Requested Instruction No. 6, which is an instruction that if they find that there was oil and grease collected on the deck forward of the port winch at Hatch No. 2, and I have also put in there that if they find that the topping lift wire for the port boom at Hatch No. 2 was not kept secured, then they are to find the steamship SS W. H. Peabody unseaworthy.

"The plaintiff excepts to the Court's failure to instruct the jury either as to the grease and oil on the deck or the unsecured topping lift."

So far as concerns the topping lift wire the court properly stated that it was not shown to have contributed to

the injury to Yanow. The sentence, "In this case if you find that there was oil and grease collected on the deck forward of the port winch as Hatch No. 2 . . . then you will find the Steamship SS W. H. Peabody unseaworthy" does not state the law since under this sentence any amount of grease however slight would constitute unseaworthiness. The court's instruction quoted above is properly based on "the quantity of oil and grease."

The judgment is reversed.

(Endorsed:) Opinion. Filed Nov. 21, 1957, as amended by order of Feb. 21, 1958.

Paul P. O'Brien, Clerk.

Appendix B

1. PERTINENT PARTS OF UNITED STATES CONSTITUTION.

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

[U. S. Const., Art. I, Sec. 1.]

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; if he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be considered, and if approved by two thirds of that House, it shall become a Law.

[U.S. Const., Art. I, Sec. 7, cl. 2.]

The Congress shall have Power

To regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes;

To constitute Tribunals inferior to the Supreme Court;

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

[U.S. Const., Art. I, Sec. 8, clauses 3, 9, 18.]

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

[U.S. Const., Art. II, Sec. 2, cl. 2.]

The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their continuance in Office.

[U.S. Const., Art III, Sec. 1.]

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between

a State and Citizens of another State; between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

[U.S. Const., Art. III, Sec. 2, clauses 1, 2.]

The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

[U.S. Const., Art. IV, Sec. 2, cl. 1.]

The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

[U.S. Const., Art. IV, Sec. 4.]

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made or which shall be made, under the Authority of the United States shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

. . . and all . . . judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; . . .

[U.S. Const., Art. VI, clauses 2, 3.]

No person shall be . . . deprived of . . . property, without due process of law; . . .

[U.S. Const., Amendment 5.]

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

[U.S. Const., Amendment 7.]

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

[U.S. Const., Amendment 9.]

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

[U.S. Const., Amendment 10.]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of . . . property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

[U.S. Const., Amendment 14, Sec. 1.]

2. STATUTORY PROVISIONS.

(a) There shall be in each circuit a court of appeals, which shall be a court of record, known as the United States Court of Appeals for the circuit.

(b) Each court of appeals shall consist of the circuit judges of the circuit in active service. The circuit justice and justices or judges designated or assigned shall also be competent to sit as judges of the court. June 25, 1948, c. 646, 62 Stat. 870; Title 28, U.S. Code, § 43.

(a) Circuit judges shall sit on the court and its divisions in such order and at such times as the court directs.

(b) In each circuit the court may authorize the hearing and determination of cases and controversies by separate divisions, each consisting of three judges. Such divisions shall sit at the times and places and hear the cases and controversies assigned as the court directs.

(c) Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in active service. A court in banc shall consist of all active circuit judges of the circuit.

(d) A majority of the number of judges authorized to constitute a court or division thereof, as provided in paragraph (c), shall constitute a quorum. June 25, 1948, c. 646, 62 Stat. 871; Title 28, § 46, U. S. Code.

(a) Any retired Chief Justice of the United States or associate justice of the Supreme Court may be designated and assigned by the Chief Justice of the United States to perform such judicial duties in any circuit, in-

cluding those of a circuit justice, as he is willing to undertake.

(b) Any retired circuit or district judge may be designated and assigned to perform such judicial duties in any circuit as he is willing to undertake. Designation and assignment of such judge for service within his circuit shall be made by the chief judge or judicial council of the circuit. Designation and assignment for service elsewhere shall be made by the Chief Justice of the United States.

(c) Any retired judge of any other court of the United States may be called upon by the chief judge of such court to perform such judicial duties in such court as he is willing to undertake.

(d) No retired justice or judge shall perform judicial duties except when designated and assigned. June 25, 1948, c. 646, 62 Stat. 901; Title 28, § 294, U.S. Code.

No designation and assignment shall be made without the consent of the chief judge or judicial council of the circuit from which a judge is to be designated and assigned.

All designations and assignments of justices and judges shall be filed with the clerks and entered on the minutes of the courts from and to which made.

The Chief Justice of the United States, a circuit justice or a chief judge of a circuit may make new designations and assignments in accordance with the provisions of this chapter, and may revoke those previously made by him. June 25, 1948, c. 646, 62 Stat. 901; Title 28, § 295, U. S. Code.

Any justice or judge of the United States appointed to hold office during good behavior who resigns after attaining the age of seventy years and after serving at least ten years continuously or otherwise shall, during the remainder of his lifetime, continue to receive the salary which he was receiving when he resigned.

Any justice or judge of the United States appointed to hold office during good behavior may retain his office but retire from regular active service after attaining the age of seventy years and after serving at least ten years continuously or otherwise. He shall, during the remainder of his lifetime, continue to receive the salary of the office.

The President shall appoint, by and with the advice and consent of the Senate, a successor to a justice or judge who retires. June 25, 1948, c. 646, 62 Stat. 903; Title 28, § 371, U.S. Code.

A justice or judge shall discharge, during the period of his designation and assignment, all judicial duties for which he is designated and assigned. He may be required to perform any duty which might be required of a judge of the court or district or circuit to which he is designated and assigned.

Such justice or judge shall have all the powers of a judge of the court, circuit or district to which he is designated and assigned, except the power to appoint any person to a statutory position or to designate permanently a depository of funds or a newspaper for publication of legal notices. June 25, 1948, c. 646, 62 Stat. 901; Title 28, § 296, U. S. Code.

Each justice or judge of the United States shall take the following oath or affirmation before performing the duties of his office: "I, _____ _____, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as _____ according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States. So help me God." June 25, 1948, c. 646, 62 Stat. 907; Title 28, § 453, U. S. Code.

If the first and second officers under the master or a majority of the crew of any vessel bound on any voyage shall, before the vessel shall have left the harbor, discover that the vessel is too leaky or is otherwise unfit in her crew, body, tackle, apparel, furniture, provisions, or stores to proceed on the intended voyage, and shall require such unfitness to be inquired into, the master shall, upon the request of the first and second officers under the master or such majority of the crew, forthwith apply to the judge of the district court of that judicial district, if he shall there reside, or if not, to some justice of the peace of the city, town, or place for the appointment of surveyors, as provided in section 654 of this title, taking with him two or more of the crew who shall have made such request; and any master refusing or neglecting to comply with these provisions shall be liable to a penalty of $500. This section shall not apply to fishing or whaling vessels or yachts. R.S. § 4556; Dec. 21, 1898, c. 28, §§ 7, 26, 30 Stat. 757, 764; Title 46, U. S. Code, § 653.

The judge or justice, in a domestic port, shall, upon such application of the master or commander, issue his receipt, directed to three persons in the neighborhood, the most experienced and skillful in maritime affairs that can be procured; and whenever such complaint is about the provisions one of such surveyors shall be a physician or a surgeon of the Public Health Service, if such service is established at the place where the complaint is made. It shall be the duty of such surveyors to repair on board such vessel and to examine the same in respect to the defects and insufficiencies complained of, and make reports to the judge, or justice, as the case may be, in writing, under their hands or the hands of two of them whether in any or in what respect the vessel is unfit to proceed on the intended voyage, and what addition of men, provisions, or stores, or what repairs or alterations in the body, tackle, or apparel will be necessary; and upon such report the judge or justice shall adjudge and shall indorse on his report his judgment whether the vessel is fit to proceed on the intended voyage, and, if not, whether such repairs can be made or deficiencies supplied where the vessel then lies, or whether it is necessary for her to proceed to the nearest or most convenient place where such supplies can be made or deficiencies supplied; and the master and the crew shall, in all things, conform to the judgment. The master or commander shall, in the first instance, pay all the costs of such review, report, or judgment, to be taxed and allowed on a fair copy thereof, certified by the judge or justice. But if the complaint of the crew shall appear upon the report and judgment to have been without foundation, the master or commander,

or the owner or consignee of such vessel, shall deduct the amount thereof, and of reasonable damages for the detention, to be ascertained by the judge or justice, out of the wages of the complaining seamen. This section shall not apply to fishing or whaling vessels or yachts. R. S. § 4557; Dec. 21, 1898, c. 28, §§ 8, 26, 30 Stat. 757, 764; July 1, 1902, c. 1370, 32 Stat. 712; Aug. 14, 1912, c. 288, 37 Stat. 309; Title 46, U. S. Code, § 654.

If, after judgment that such vessel is fit to proceed on her intended voyage, or after procuring such men, provisions, stores, repairs, or alterations as may be directed, the seamen, or either of them, shall refuse to proceed on the voyage, he shall forfeit any wages that may be due him. This section shall not apply to fishing or whaling vessels or yachts. R.S. § 4558; Dec. 21, 1898, c. 28, §§ 9, 26, 30 Stat. 757, 764; Title 46, U.S. Code, § 655.

Upon a complaint in writing, signed by the first and second officers or a majority of the crew of any vessel, while in a foreign port, that such vessel is in an unsuitable condition to go to sea because she is leaky or insufficiently supplied with sails, rigging, anchors, or any other equipment, or that the crew is insufficient to man her, or that her provisions, stores, and supplies are not or have not been during the voyage sufficient or wholesome, thereupon, in any of these or like cases the consul shall cause to be appointed three persons of like qualifications with those described in section 654 of this title, who shall proceed to examine into the cause of complaint and who shall proceed and be governed in all their proceedings as provided by said section. This section shall not apply to fishing or whaling vessels or yachts. R.S. § 4559;

Dec 21, 1898, c. 28, §§ 10, 26, 30 Stat. 757, 764; Mar. 4, 1915, c. 153, § 5, 38 Stat. 1165; Title 46, U.S. Code, § 656.

The inspectors appointed by any consul, in pursuance of section 656 of this title, shall have full power to examine the vessel and whatever is aboard of her, so far as is pertinent to their inquiry, and also to hear and receive any other proofs which the ends of justice may require; and if, upon a view of the whole proceedings, the consul is satisfied therewith, he may approve the whole or any part of the report, and shall certify such approval; or if he dissents, he shall certify his reasons for dissenting. (R.S. § 4560; Apr. 5, 1906, c. 1366, § 3, 34 Stat. 100; Title 46, U.S. Code, § 657.

The inspectors in their report shall also state whether in their opinion the vessel was sent to sea unsuitably provided in any important or essential particular, by neglect or design, or through mistake or accident; and in case it was by neglect or design, and the consular officer approves of such finding, he shall discharge such of the crew as request it, and shall require the payment by the master of one month's wages for each seaman over and above the wages then due, or sufficient money for the return of such of the crew as desire to be discharged to the nearest and most convenient port of the United States, or by furnishing the seamen who so desire to be discharged with employment on a ship agreed to by them. But if in the opinion of the inspectors the defects or deficiencies found to exist have been the result of mistake or accident, and could not, *in the exercise of ordinary care*, have been known and provided against *before* the sailing of the vessel, and the master shall in a reasonable time remove or remedy the causes of complaint, then the

crew shall remain and discharge their duty. *If any person knowingly sends or attempts to send or is party to the sending or attempting to send an American ship to sea, in the foreign or coastwise trade, in such an unseaworthy state that the life of any person is likely to be thereby endangered, he shall, in respect of each offense, be guilty of a misdemeanor, and shall be punished by a fine not to exceed $1,000 or by imprisonment not to exceed five years, or both, at the discretion of the court, unless he proves that either he used all reasonable means to insure her being sent to sea in a seaworthy state, or that her going to sea in an unseaworthy state was, under the circumstances, reasonable and justifiable,* and for the purposes of giving that proof he may give evidence in the same manner as any other witness. This section shall not apply to fishing or whaling vessels or yachts. R.S. § 4561; June 26, 1884, c. 121, § 4, 23 Stat. 54; Dec. 21, 1898, c. 28, §§ 11, 26, 30 Stat. 758, 764; Title 46, U.S. Code, § 658.

The master shall pay all such reasonable charges for inspection under such complaint as shall be officially certified to him under the hand of the consul; but in case the inspectors report that the complaint is without any good and sufficient cause, the master may retain from the wages of the complainants, in proportion to the pay of each, the amount of such charges, with such reasonable damages for detention on that account as the consul directing the inquiry may officially certify. R.S. § 4562; Apr. 5, 1906, c. 1366, § 3, 34 Stat. 100; Title 46, U.S. Code, § 659.

Should any master or owner of any merchant vessel of the United States neglect to provide a sufficient quantity of stores to last for a voyage of ordinary duration to the port of destination, and in consequence of such neglect

the crew are compelled to accept a reduced scale, such master or owner shall be liable to a penalty as provided in section 665 of this title. R.S. § 4564; Dec. 21, 1898, c. 28, § 12, 30 Stat. 758; Title 46, U.S. Code, § 661.

Whenever on the discharge of a seaman in a foreign country by a consular officer on his complaint that the voyage is continued contrary to agreement, or that the vessel is badly provisioned or unseaworthy, or against the officers for cruel treatment, it shall be the duty of the consul or consular agent to institute a proper inquiry into the matter, and, upon his being satisfied of the truth and justice of such complaint, he shall require the master to pay to such a seaman one month's wages over and above the wages due at the time of discharge, and to provide him with adequate employment on board some other vessel, or provide him with a passage on board some other vessel bound to the port from which he was originally shipped, or to the most convenient port of entry in the United States, or to a port agreed to by the seaman. R.S. § 4583; June 26, 1884, c. 121, § 3, 23 Stat. 54; Dec. 21, 1898, c. 28, § 18, 30 Stat. 760; Title 46, U.S. Code, § 685.

It is necessary for the national defense and for the proper growth of its foreign and domestic commerce that the United States shall have a merchant marine of the best equipped and most suitable types of vessels sufficient to carry the greater portion of its commerce and serve as a naval or military auxiliary in time of war or national emergency, ultimately to be owned and operated privately by citizens of the United States; and it is declared to be the policy of the United States to do whatever may be necessary to develop and encourage the maintenance of such a merchant marine, and, insofar as may not be in-

consistent with the express provisions of this chapter, the United States Maritime Commission shall, in the disposition of vessels and shipping property as hereinafter provided, in the making of rules and regulations, and in the administration of the shipping laws keep always in view this purpose and object as the primary end to be attained. June 5, 1920, c. 250, § 1, 41 Stat. 988; Ex. Ord. No. 6166, § 12, June 10, 1933; June 29, 1936, c. 858, §§ 204, 904, 49 Stat. 1987, 2016; Title 46, U.S. Code, § 861.

The policy and the primary purpose declared in section 861 of this title are hereby confirmed. May 22, 1928, c. 675, § 1, 45 Stat. 689; Title 46, U.S. Code, § 891.

It is necessary for the national defense and development of the foreign and domestic commerce that the United States shall have a merchant marine (a) sufficient to carry its domestic water-borne commerce and a substantial portion of the water-borne export and import foreign commerce of the United States and to provide shipping service on all routes essential for maintaining the flow of such domestic and foreign water-borne commerce at all times, (b) capable of serving as a naval and military auxiliary in time of war or national emergency, (c) owned and operated under the United States flag by citizens of the United States, insofar as may be practicable, and (d) composed of the best-equipped, safest, and most suitable types of vessels, constructed in the United States and manned with a trained and efficient citizen personnel. It is hereby declared to be the policy of the United States to foster the development and encourage the maintenance of such a merchant marine. June 29, 1936, c. 858, Title I, § 101, 49 Stat. 1985; Title 46, U.S. Code, § 1101.

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Respondent overlooks the fact that petitioner was the prevailing party in the trial court and that the first time it became necessary for it to attack the judgment reversing the judgment in its favor in the trial court was when the Court of Appeals reversed said judgment 1

II.

Respondent's gratuitous and erroneous assumption that petitioner contends that the decision in The Osceola was an unconstitutional assumption of legislative power should be ignored 3

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In the Supreme Court
OF THE
United States

October Term, 1957

No. 845

Weyerhaeuser Steamship Company,
a corporation,
Petitioner,

vs.

Harold Yanow,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITIONER'S REPLY BRIEF.

I.

RESPONDENT OVERLOOKS THE FACT THAT PETITIONER WAS THE PREVAILING PARTY IN THE TRIAL COURT AND THAT THE FIRST TIME IT BECAME NECESSARY FOR IT TO ATTACK THE JUDGMENT REVERSING THE JUDGMENT IN ITS FAVOR IN THE TRIAL COURT WAS WHEN THE COURT OF APPEALS REVERSED SAID JUDGMENT.

In its brief on the merits in the Court of Appeals Petitioner clearly asserted its contention, by quoting from decisions, that "Nevertheless, that opinion [Petterson v.

Alaska S. S. Co., 347 U. S. 396] does not go so far as to hold that unseaworthiness arises from every defect in a vessel or in its equipment and maintenance, whether consisting of a *transitory* substance or otherwise." [Appellee's Answering Brief, p. 10.]

The fact that the Court below did not specifically refer to the Cookingham line of decisions does not support a contention, which seems to be asserted by Respondent, that the decision of the Court below is not in conflict therewith.

When it *first* became apparent to Petitioner, upon reading the opinion of the Court below, that *it* was of the opinion that this Court, in *The Osceola,* had held that a shipowner or ship-operator was liable, *in personam,* irrespective of negligence, for all personal injury suffered by a seaman or longshoreman in consequence of a *transitory* condition consisting of a spot of grease on a deck which was otherwise absolutely sound and without the slightest actual or latent defect of design or construction, a petition for rehearing raising contentions to the contrary was duly served and filed. All of the substantial points raised in the Petition for a Writ of Certiorari are exposed in said petition for rehearing, but the Court of Appeals refused to consider or decide them. What more could Petitioner have done? There was no reason, necessity or opportunity to raise any points by way of specification of errors allegedly committed by the trial court for the simple reason that Petitioner had prevailed in the trial court and was in no position to attack the judgment in its favor, even if the trial judge had given instructions which were erroneous as to Petitioner.

II.

RESPONDENT'S GRATUITOUS AND ERRONEOUS ASSUMPTION THAT PETITIONER CONTENDS THAT THE DECISION IN THE OSCEOLA WAS AN UNCONSTITUTIONAL ASSUMPTION OF LEGISLATIVE POWER SHOULD BE IGNORED.

Petitioner's contentions in respect of *The Osceola* are clearly set forth in the Petition for Rehearing and also in the Petition for a Writ of Certiorari. Respondent is attempting, on page 6 of his Brief in Opposition, to lead this Court astray on this issue.

Dated, April 2, 1953.

Respectfully submitted,

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Counsel for Petitioner.

Office - Supreme Court, U.S.
FILED
APR 7 1958
JOHN T. FEY, Clerk

No. 845

In the Supreme Court of the United States

OCTOBER TERM, 1957

WEYERHAEUSER STEAMSHIP COMPANY,
a corporation,
Petitioner,

vs.

HAROLD YANOW,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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No. 845

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HAROLD YANOW,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The original opinion of the United States Court of Appeals for the Ninth Circuit is reported at 250 F. 2d 74. The amended opinion dated February 21, 1958, is not reported at this time but is printed in Petitioner's Appendix A, pp. 13-19. There was no opinion rendered by the District Court.

JURISDICTION

The judgment of the Court of Appeals was entered on February 21, 1958, and the Petition for a Writ of

Certiorari was served upon respondent on March 8, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

In view of the length and lack of clarity of the Petition for a Writ of Certiorari it is difficult for respondent to determine the exact questions sought to be reviewed. However, after careful study of the Petition it would appear that the following questions concern Petitioner:

1. Whether the decision of the Court of Appeals in this case is in conflict with the decisions of other Courts of Appeals, particularly those of the Third Circuit in that the Court of Appeals herein refused to apply the Third Circuit's doctrine of "transitory unseaworthiness" as expressed in *Cookingham v. U. S.*, 184 F. 2d 213, cert. den., 304 U.S. 935.

2. Whether the Court of Appeals erroneously construed this Court's opinion in the *"The Osceola,"* 189 U.S. 158, and whether similar constructions of said case by this Court and all inferior Courts since 1903 have been erroneous and in violation of the United States Constitution which provides for separation of powers between the legislative and judicial branches of the federal government.

3. Whether the Court of Appeals erred in reversing the District Court's judgment on the ground that the District Court improperly instructed the jury as to the law of unseaworthiness.

STATEMENT

Petitioner seeks review of the judgment of the Court of Appeals for the Ninth Circuit reversing the judgment of the United States District Court for the District of Oregon, which was based upon a jury verdict for the petitioner.

The evidence shows that respondent Yanow was working as a longshoreman at Coos Bay, Oregon, on August 1, 1954, aboard petitioner's vessel the W. H. PEABODY, a 10,000 ton Liberty Ship (R. 26, 31). The gang he was working with was engaged in stowing the deck load of lumber at No. 2 hatch. This involved moving loads of lumber on rollers into position where the men were working to build up the level of the "floor" (R. 32-35). A load of lumber had just been landed and respondent needed a peavey to facilitate his work. He went to get one behind the No. 2 port winch and there is strong testimony that as he walked by the winch he slipped on the "blob of grease" (R. 35, 36) and fell, striking his back on part of the winch on the way down (R. 36).

As a result of this fall, there is evidence that the respondent aggravated a previous back condition and sustained a bruised back, a bumped head, and had the wind knocked out of him (R. 40).

There was no direct proof of how the grease got on the deck near the winch, but it might be inferred from the evidence that it came from lubrication of the winch or from a coiled wire fall which was on the deck between

the winch and the deckhouse (R. 37, 38, 57, 69, 70, 115, 135, 160-1).

Respondent based his action for damages on two claims: (1) That petitioner was negligent in allowing grease or oil to accumulate on the deck of the W. H. PEABODY, and in failing to cover it with sand or sawdust, to provide respondent with a safe place to work, to inspect, and to warn respondent; and (2) in that the vessel was unseaworthy (R. 5).

The jury returned a verdict for the petitioner and respondent appealed to the Court of Appeals on the ground that the Court had erroneously instructed the jury in two respects:

1. By giving an instruction to the effect that if the injuries to respondent resulted from an unavoidable accident, "accidents which happen without the fault of anyone," then the jury must find for the petitioner.

Respondent contended that such instruction was broad enough to cover his cause of action based upon the alleged unseaworthiness of the W. H. PEABODY, as well as his cause of action based upon the ship's negligence. The Court of Appeals agreed with respondent and reversed.

2. By leaving to the jury the question of whether there was sufficient oil or grease collected on the deck where respondent fell as to render the ship unseaworthy. The Court of Appeals held that this instruction was proper.

ARGUMENT

1. Respondent believes that the Petition for a Writ of Certiorari does not comply with this Court's rules in that it is not clear and concise and the issues raised are not clearly set forth. The Petition for a Writ of Certiorari should be denied for this reason. Rule 23 (4).

2. The record fails to show that petitioner requested any instructions at the trial of this case embodying the doctrine of "transitory unseaworthiness" as formulated by the Third Circuit in the *Cookingham* case. No exceptions appear in the record to the alleged refusal of the trial Court to give such instructions. No issue of this sort was raised by petitioner in the trial Court in any way. The validity or the application of the *Cookingham* rule was not in issue in the Court of Appeals nor did the Court of Appeals discuss it in its opinion. At no point in the proceedings below was the doctrine of "transitory unseaworthiness" litigated or decided and respondent therefore suggests that the issue is not ripe for decision by this Court in this case. *Walters v. The City of St. Louis, Mo.*, 347 U.S. 231 (1954).

3. The liability of a ship for injuries caused by unseaworthiness which was announced by this Court in *The Osceola* in 1903 was not challenged by petitioner either in the trial Court or in the Court of Appeals. However, petitioner would have this court on such a record overrule 55 years of maritime law based upon *The Osceola* decision. It would have this Court reverse its humane approach towards the administration of maritime law and revoke from seamen their remedy for

personal injuries resulting from the unseaworthiness of a vessel.

Apparently petitioner also contends that the decision in *The Osceola* was an unconstitutional assumption of legislative power by this Court. It will be noted, however, that these constitutional issues were not raised below or decided by the Court of Appeals. Respondent suggests that petitioner is attempting to raise this issue far too late in this proceeding.

4. If respondent had a right to claim damages resulting from the unseaworthiness of petitioner's vessel, he obviously had a right to a jury trial based upon an accurate instruction by the Court as to the law of unseaworthiness. For this reason, the Court of Appeals quite properly reversed the judgment where prejudicial error was made by the Trial Court in its instruction on this issue.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

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